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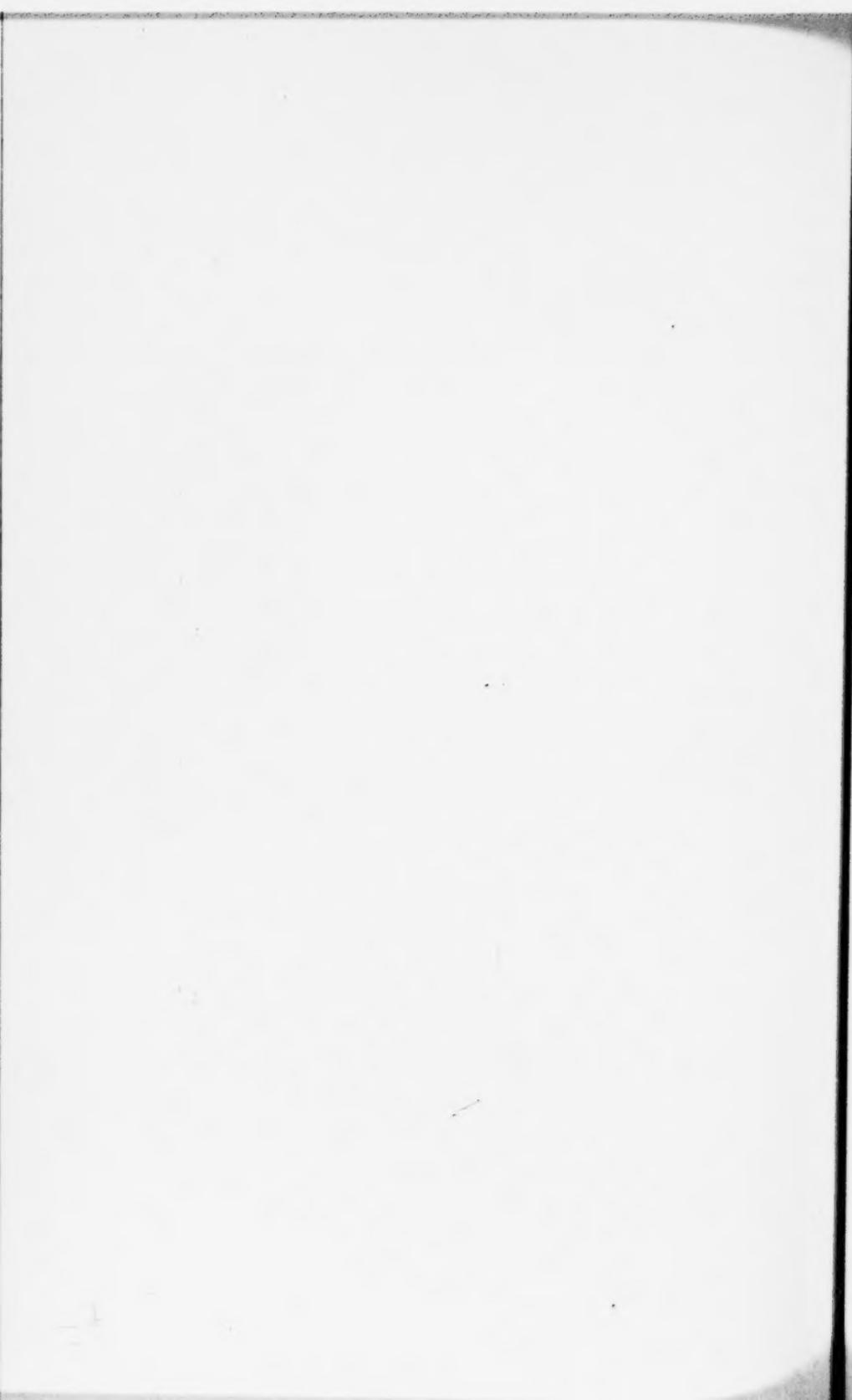
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 120

OLAF OSWALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 35-38) is reported in 133 F. (2d) 82, *sub nom. United States v. Metzger*.

JURISDICTION

The order sought to be reviewed was entered January 9, 1943 (R. 34-35). A petition for rehearing was denied April 5, 1943 (R. 42). The petition for a writ of certiorari was filed June 26, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the reporter of the United States District Court for the Territory of Hawaii, a salaried employee of the United States, may be compelled to furnish the Government a transcript of evidence without charge.

STATUTES AND RULE INVOLVED

Section 86 of the Act of April 30, 1900, c. 339, 31 Stat. 158, as amended (48 U. S. C. sec. 644), provides in part:

* * * The said district judges [of the district court of the Territory of Hawaii] shall appoint a reporter of said court at a salary of \$1,200 per annum.¹

R. S. sec. 1765 (5 U. S. C. sec. 70) provides:

No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

¹ By other statutes, the reporter's salary was raised to \$2,600 per annum. See *Oswald v. United States*, 96 F. (2d) 10, 12 (C. C. A. 9).

Rule 80 (b) of the Federal Rules of Civil Procedure provides:

Official Stenographers. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

STATEMENT

In 1931, petitioner was appointed official court reporter for the United States District Court for the Territory of Hawaii (R. 32). Thereafter, the Comptroller General rejected petitioner's claim for payment for a transcript of testimony furnished the United States.² In *Oswald v. United States*, 96 F. (2d) 10 (C. C. A. 9), the dismissal of a suit by which petitioner sought to recover for such services under the Tucker Act was affirmed, the court holding that petitioner was an officer of the United States and that the furnishing of transcripts to the Government was part of his offi-

² See *Oswald v. United States*, 96 F. (2d) 10, 11 (C. C. A. 9).

cial duties. Following the decision, a bill (H. R. 6779, 76th Cong., 1st sess.) to pay this claim was introduced in Congress, but no action was taken thereon (84 Cong. Rec. 6947).

In a subsequent proceeding brought by the United States to condemn land in Hawaii (R. 3), stenographic notes of the trial were taken by petitioner (R. 3-4). The Government sought to obtain a transcript of the testimony for purposes of appeal. However, petitioner refused to furnish such transcript unless paid in advance, and the district court sustained Oswald's position. (R. 16-17.) The United States thereupon petitioned the circuit court of appeals for a writ of mandamus, alleging that it was Oswald's official duty to furnish such transcript and that the United States is prohibited from making any payment therefor in addition to Oswald's annual compensation (R. 5). The petition was granted, the court holding that furnishing of the transcript was an ordinary duty of Oswald's office for which he could not claim extra compensation (R. 37).³

ARGUMENT

Unlike the situation prevailing in most federal district courts (see *Miller v. United States*, 317 U. S. 192, 197), petitioner is an officer of the

³ The Government's petition also sought relief against the district judge because of the order which had been entered sustaining Oswald's claim (R. 5). The court below found it unnecessary to consider this request (R. 38).

United States, appointed pursuant to statute and receiving a regular salary. Only two other instances are known where official positions of court reporter have been created. See 48 U. S. C. sec. 102 (United States District Court for the Territory of Alaska), and 48 U. S. C. secs. 863 and 870 (United States District Court for the District of Puerto Rico). No question of general importance is presented (cf. Pet. 5), and the decision below is clearly correct.

1. Petitioner asserts (Pet. 11-12) that his official duties were limited to taking of notes and furnishing a transcript for use of the trial judge. But as the court stated in *Oswald v. United States*, 96 F. (2d) 10, 13 (C. C. A. 9), with reference to a transcript furnished the Government:

If he were not required to furnish transcripts of testimony, there would be no purpose in having a reporter; the notes must be read or transcribed at some time to be of any value at all. The purpose in having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony whenever required. It follows, as a matter of course, that the furnishing of transcripts of testimony is an ordinary duty of an official stenographic reporter and such services rendered by him are "official services".

Petitioner does not refer to any authority, nor does he suggest any reason why his official duty, as

an employee of the United States, is limited to furnishing the court such transcripts as it might desire. Cf. *Johnson v. Ward*, 102 Miss. 464, 59 So. 806; *People v. Santiago*, 16 Puerto Rico 446. Obviously, petitioner's annual salary of \$2,600 included compensation for preparation of transcripts which the Government might require. Hence, petitioner's assertion that his property has been taken for public use without compensation (Pet. 9-10) is wholly without merit.

2. Petitioner contends (Pet. 6-9) that Rule 80 of the Federal Rules of Civil Procedure is inconsistent with Section 86 of the Act of April 30, 1900, c. 339, 31 Stat. 158 (48 U. S. C. sec. 644), providing for the appointment of an official court reporter for the Hawaiian district court, and concludes that this special statute was repealed. But, as appears from the statement of Mr. Donworth of the Advisory Committee, Rule 80 relates to the usual situation where the stenographer is not a government official. The Committee thought that a rule providing for payment of stenographers' salaries by the United States was beyond its jurisdiction and must be left to Congress. See Report of Proceedings before Institute on Federal Rules of the American Bar Association, Cleveland, pp. 354-355 (1938).

Plainly, the Act of June 19, 1934, c. 651, 48 Stat. 1064, authorizing this Court to prescribe procedural rules, did not contemplate the abolition of

an official position previously created by specific statute. This conclusion is confirmed by the fact that the Act of June 16, 1939, e. 211, 53 Stat. 841, which made the federal rules applicable to Hawaii, took the form of an addition to Section 86 of the Act of April 30, 1900 (*supra*, p. 2). There is no indication of intent to repeal any of the existing provisions of Section 86, which included the authorization to appoint a court reporter. The failure of the same Congress (76th Cong., 1st sess.) to pass H. R. 6779, by which Oswald sought to recover additional compensation for the transcript he had previously furnished to the Government, further confirms this fact. Finally, petitioner himself continued to receive his \$2,600 annual salary under the statute which he now claims was repealed.⁴

The rule⁵ of the district court in Hawaii to which petitioner makes repeated reference (Pet. 2, 7-8, 11-12) could of course not operate to compel the United States to pay extra compensation for official services, in view of R. S. sec. 1765 (*supra*, p. 2), as petitioner's "emoluments are fixed by law."

⁴ This fact does not appear in the record but has been verified by the Administrative Office of the United States Courts.

⁵ This rule is set forth in the Petition, pp. 7-8.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

OSCAR COX,

Acting Solicitor General.

NORMAN M. LITTELL,

Assistant Attorney General.

VERNON L. WILKINSON,

ROGER P. MARQUIS,

Attorneys.

JULY 1943.

